90-1382

Supreme Court, U.S.
FILED
FEB 7 1991
OFFICE OF THE CLERK

No. 91-

IN THE SUPREME COURT FOR THE UNITED STATES

OCTOBER TERM, 1990

ROBERT L. McCULLOUGH and
MARY NAN McCULLOUGH

Petitioners,

v.

FEDERAL SAVINGS & LOAN
INSURANCE CORPORATION, etc.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the "doctrine" of *D'Oench, Duhme, & Company v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942) impose strict liability on borrowers from a failed thrift institution for claimed debts, where such claims are asserted by the FSLIC in its receivership capacity or by one of its successors in interest?

2. Does the application OF federal common law rules created subsequent to the occurence of discrete commercial acts, ie: borrowing money from a thrift institution which subsequently fails, upset settled commercial expectations in contravention of *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979)?

3. Does the *D'Oench* doctrine apply to situations in which the borrower from a thrift institution which subsequently failed was not a party to a secret agreement and where the banking regulators had actual knowledge that a claim of state law defenses, including claims of fraud and lack of consideration, were being asserted by the borrower at the time the banking regulators assumed control of the failed thrift institution?

4. Are *D'Oench* doctrine immunities from state law defenses available to the federal banking regulators in their receivership capacity?

5. Do the protections of due process prohibit the use of federal common law rules by federal banking regulators, or their successors in interest, to deprive borrowers from failed thrift institutions of their state law defenses while borrowers from thrift institutions which do not fail retain such defenses?

6. Is it a prohibited classification under the decision of *Harris v. McRae*, 448 U.S. 297, 65 L.Ed. 2d 748, 100 S.Ct. 2671 (1980), and its progeny, to deprive borrowers of failed thrift institutions of state law defenses to claims against them by the banking regulators, or their successors in interest, while borrowers from thrift institutions which do not fail retain such state law defenses to identical claims made against them by thrift institutions which have not failed?

7. Do the protections of due process prohibit federal common law rules which deprive borrowers from failed thrift institutions of state law defenses to claims by the banking regulators, or their successors in interest, where the borrower has made no secret agreement or engaged in any form of fraud and where fraud in the inducement has been practiced upon the borrower by the failed thrift institution?

8. Do the protections of due process prohibit federal comon law rules which operate to allow banking regulators, or their successors in interest, to seek equitable relief in order to recover from a borrower from a failed thrift institution, while denying state law defenses, including the right to corresponding equitable relief, to the borrower?

THE PARTIES BELOW

Petitioners

Robert L. McCullough and
Mary Nan McCullough

Respondents

Federal Savings and Loan Insurance Corporation
Twin City Savings, FSA, A federal Mutual Association
Federal Home Loan Bank Board
Federal Savings and Loan Insurance Corporation

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FEDERAL SAVINGS & LOAN INSURANCE CORPORATION, etc.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Eleventh Circuit entered in the above referenced matter on September 10, 1990, and the denial of rehearing on November 9, 1990.

OPINION BELOW

The opinion sought to be reviewed is *Federal Deposit Insurance Corporation v. McCullough*, 911 F.2d 598 (11th Cir. 1990) (App. A). The opinion of United States District Judge Robert E. Varner of the Middle District of Alabama, dated

November 9, 1988, granting summary judgment against the Petitioners is reproduced as Exhibit B.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Nature of the Case

The complaint was filed on April 20, 1988, by "Twin City Savings, FSA, a Federal Mutual Association" (hereinafter "New Twin City"). The only jurisdictional basis was diversity of citizenship. The complaint claims failure of the Petitioners to pay a $1,030,000.00 note, secured by a mortgage and a rent assignment. The note, mortgage and rent assignment were executed on October 31, 1985, to Twin City Savings Bank, FSB (hereinafter "Old Twin City"). On August 20,1987, the Federal Home Loan Bank Board appointed the FSLIC as receiver of Old Twin City, and the FSLIC succeeded to the note, mortgage and assignment. The FSLIC assigned the note *on a non-recourse basis* to New Twin City. The Petitioners filed a motion to dismiss on May 10, 1988, which was denied on June 15, 1988.1 The Petitioners filed on June 30, 1988, an answer and counterclaim alleging, among other

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1 On June 23, 1988, the Eleventh Circuit decided the case of *Trigo v. FDIC*, 847 F. 2d 1499 (11th Cir. 1988), holding that the FDIC in its receivership capacity was not entitled to the protections of the *D'Oench* doctrine. This reinforced the decision of the Eleventh Circuit in *Gunter v. Hutchinson*, 674 F. 2d 862 (11th Cir. 1982), which also held that the FDIC was not entitled to the protections of 12 USC § 1823(e) where fraud in the inducement was claimed by the alleged debtor. The Eleventh Circuit had never prior to August of 1989, after the briefs on this appeal had already been filed, extended the protections of the *D'Oench* doctrine to the FSLIC, much less a bank to which it assigned the alleged assets of a failed bank. *(FSLIC v. Two Rivers Associates*, 880 F 2d 1267 (11th Cir. 1989)) Accordingly, under the law in the Eleventh Circuit until August 21, 1989, the instant case was *just* a lawsuit between an alleged creditor and an alleged debtor.

things, fraud in the inducement. On July 28, 1988, New Twin City filed a motion for summary judgment.

On November 9, 1988, the district court granted New Twin City's motion for summary judgment in the amount of $1,030,000.00 plus interest and costs. The district court's order (App. B) was based on *D'Oench, Duhme & Co., Inc. v FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed.956 (1949), which the district court found provided federal common law exemptions to the FSLIC from certain defenses because there was a secret agreement contrary to Old Twin City's records. The district court granted *D'Oench* protections to successors in interest to the FSLIC. The district court held that New Twin City did not have a mortgage enforceable under Alabama law because the mortgage was not properly acknowledged and was not witnessed. The district court held the mortgage was *legally void*, but that New Twin City was entitled to an "equitable mortgage." The district court disregarded the defendants' equitable defenses despite affidavits stating Old Twin City had promised to convey additional real property and certain oil "leases" as consideration for the note and mortgage, which propertywas not conveyed (App B).The defendants filed a motion to reconsider on November 22,1988, denied on March 3,1989.

On December 9, 1988, the FSLIC, as receiver for New Twin City, filed a motion for substitution of parties, alleging that by resolution dated November 9, 1988, the Federal Home Loan Bank Board had appointed FSLIC as receiver for New Twin City, the plaintiff in whose name summary judgment was rendered on November 9, 1988. This motion was granted on December 14, 1988.2

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2 In the opinion instanter, the Eleventh Circuit stated that "the FSLIC as receiver for new Twin City was the plaintiff at the time the district court issued its *final* order in this case denying the outstanding motion for reconsideration." (App. A). The circuit court held that this made it unnecessary to decide, as the district court did, whether successors in interest to the FSLIC were entitled to the same *D'Oench* protections, "Rather our focus is merely limited to those defenses that could be

After the case had been submitted for decision to the Eleventh Circuit, the FSLIC was abolished and the FDIC as manager of the FSLIC Recolution Fund, was substituted for the FSLIC as receivier of New Twin City.

The Eleventh Circuit affirmed. (App. A) September 10, 1990, rehearing denied November 9, 1990.

B. Outline of the Facts

In July of 1985, the Petitioners became interested in certain Alabama real property and oil rights owned by Charles Little ("Little") which were mortgaged and pledged to Old Twin City. In August of 1985, Mr. Little and Mr. McCullough went to the office of Old Twin City and agreed with the president that the Petitioners would purchase the Little property.3

On October 31,1985, Little and an attorney representing Old Twin City came to the Petitioners' home and they executed a note, mortgage and rent assignment at the kitchen table. The note, mortgage and rent assignment incorrectly

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asserted by the FSLIC as real party in interest." (App. A). It is clear that under the *Trigo* decision, which was the law of the Eleventh Circuit until August 21, 1989, when a panel of this Court overruled both the *Trigo* and *Gunter* cases (*Two Rivers Associates* case), that neither the FDIC or the FSLIC in their receivership capacities were entitled to the *D'Oench* defenses. Moreover, the Eleventh Circuit had never held that the FSLIC was entitled to the protections of the *D'Oench* doctrine in any capacity. The plain language of 12 USC § 1823 makes it applicable to the FDIC only.

3 Little had mortgaged to Old Twin City, in addition to the real property actually conveyed to Petitioners, 486 acres in Covington County, Alabama. Little and Old Twin City agreed that this property was also to transfer to the McCulloughs, along with various oil leases. The 486 acres and the oil leases have never been transferred to the Petitioners. Mr. McCullough made it clear to Old Twin City that if he did assume Little's debt, it would only be on the condition that the consideration include the 486 acres plus the oil leases. (R1-17-4) The defendants signed the note, mortgage and rent assignment *believing this property was included in them*. (R1-17-5) There was no secret deal.

stated they were executed in Andalusia, Alabama, and the acknowledgment incorrectly stated that the Petitioners had signed the documents in the presence of the notary.[4]

As of January, 1986, the Petitioners had not received any deeds, any title insurance or any other evidence that any of the agreed property had ever been transferred to them by Old Twin City. Mr. McCullough demanded that the attorney who had come to his home to get the documents signed straighten out the transfers. On May 21, 1986, Mr. Little and Mr. McCullough went to the home office of Old Twin City in Louisiana and met with its president. Mr. McCullough told the president that before he would make any payments he must receive the deeds and other transfer documents and the terms and conditions of the note would have to be renegotiated. The president agreed and on the spot gave Mr. McCullough a letter evidencing the new agreement. The president instructed his attorney to immediately prepare the documents to carry out these agreements.

The Petitioners then sent $77,772.05 to Old Twin City on May 30,1986. They did not receive the amended note as promised, despite many written requests, until June 4, 1987. Though the Petitioners have performed their part of the agreement with Old Twin City, they have never received transfer of the oil leases or the 486 acres.[5]

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4 New Twin City admitted this was so, admitted the improper acknowledgment made the mortgage legally void under Alabama law, and prayed for and received from the district court an *equitable* mortgage. (1-34-7) (App. B)

5 The only evidence that the note and mortgage were in default and not paid in accord with the renegotiated terms was an unsupported statement by the president of New Twin City in an affidavit. This was disputed by Petitioners. The appellants briefed this failure of proof, but the district and circuit courts ignored this failure of proof. The undisputed evidence was that the Petitioners had paid $195,000.00 to Old Twin City and $40,000 to the Little bankruptcy trustee. There was a factual issue as to when the payments should have begun and whether, under the renegotiated note and mortgage, the payments due had been fully paid when New Twin City filed suit. (R1-17)

The Old Twin City attorney on May 21, 1986, gave Mr. McCullough a set of documents which he represented were proper documents transferring the title to *all* the property in question. The Petitioners, who had no legal counsel, accepted that representation and did not retain an attorney to check them. The documents did not include the oil leases or the 486 acres in Covington County, Alabama.

On September 2,1986, Mr. McCullough received a letter from Old Twin City which stated, in part, as follows:

> "Mr. McCullough, I have talked to Mr. Hollock about the amendment to the mortgage. When this is done, I will figure the total due to bring the loan current on a monthly basis."

The Petitioners never received the promised "amendment to the mortgage."

In October of 1986, the Petitioners had an opportunity to sell some of the real property and requested an attorney to obtain from Old Twin City a listing of the individual pieces of real property and the payment that Old Twin City would require to release each piece of real property. They then discovered for the first time that the listing of the individual properties did not include the 486 acres in Covington County and that the oil leases had not been transferred.

The Petitioners were advised by the bankruptcy court for the United States District Court for the Middle District of Alabama that Little had filed bankruptcy and that the bankruptcy trustee was making a claim against the properties which the Petitioners believed they had acquired from Old Twin City. The McCulloughs were forced to pay the trustee $40,000.00 to prevent the seizure of these properties in the bankruptcy proceedings.

The Petitioners paid $40,000.00 to the bankruptcy trustee and $160,000.00 to Old Twin City, but were unable to get the 486 acres and the oil leases transferred to them by Old

Twin City. Even so, the Petitoners made an additional $35,000.00 payment to Old Twin City. The Petitioners demanded in writing as a condition of any further payment transfer of the oil leases, the 486 acres and the amended mortgage and note they had been promised.[6]

No lawsuit was ever filed against the Petitioners by Old Twin City to collect the alleged debt. On August 20, 1987, the FSLIC became receiver of Old Twin City and New Twin City was formed. The FSLIC made *a non-recourse assignment* of the note and mortgage to New Twin City.[7]

The motion for summary judgment was based on three affidavits of the president of New Twin City. The third affidavit was submitted to establish that there was no reference to the 486 acres or the oil leases in the records of Old Twin City. Actually, there is a loan memorandum in those records which states as follows:

> "We will loan Robert McCullough, Sr. $1,030,000.00 Collateral will be:
>
> Delta Mart
> ABC Store
> Hercules Building
> *Andalusia Property, Parcels 1, 2, 3, 4 and 5*
>
> Needs:
>
> 1) New appraisals from Buddy Eslava
> 2) *Transfer of Oil Runs and title opinion by Davin and Davin.*"

(Emphasis supplied)

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6 One of the curious things about this whole business is the failure of Old Twin City or any of its successors to offer to transfer the 486 acres or the oil leases to the Petitioners in exchange for payment. These entities, though relying on equitable relief to enforce the debt, apparently expect to be paid the money *twice* for the 486 acres and the oil leases.

7 New Twin City took the position in this case in a brief filed May 31, 1988, that "neither the FHLBB or FSLIC has any legal title or interest in the note, mortgage and assignment which has been made the basis of this suit..."

The Eleventh Circuit held in the instant opinion that (1) the FSLIC was the real party in interest even though it did not become a party until after the motion for summary judgment was granted because it became a party before the motion to reconsider the motion for summary judgment was denied, (2) the FSLIC as receiver of New Twin City was entitled to raise federal common law defenses to defeat state law claims of fraud in the inducement and failure of consideration when suing on a note, (3) the agreement relied upon by a borrower from a failed bank to defeat a claim by the FSLIC on a note must be memorialized in the records of the failed bank and the actual knowledge of the agreement by the FSLIC is simply irrelevant to its ability to take advantage of the *D'Oench* doctrine, (4) lack of intent of a borrower to defraud banking authorities is irrelevant to availability of *D'Oench* doctrine, (5) it is not relevant to availability of federal common law defenses to banking authorities whether the agreement relied upon by a borrower is fraudulent, (6) lack of specific documentation in bank files evidencing bank's obligation to transfer specific properties, even though there are references to such obligations in the bank's files, defeats borrowers state law claims for failure of the bank to transfer such property, (7) where mortgage was valid on its face, defects in the execution of the mortgage which render it void as a matter of state law cannot be asserted by the borrower to defeat collection of the note by the FSLIC as receiver of the failed bank.

REASONS FOR GRANTING THE WRIT

A. The Decision Is Contrary To The Decision Of This Court Prohibiting Ex Post Facto Liability

The defendants executed the note and mortgage in issue in this case on October 31, 1985. Under the law of the Eleventh Circuit at that time, and up until August 21, 1989, after the briefs on this appeal had been submitted to the

Eleventh Circuit, the FSLIC was not entitled to the protection of the *D'Oench* doctrine in its capacity as a reciever of a failed financial institution. For that matter, neither was the FDIC. *Gunter v. Hutcheson*, 674 F.2d 862 (11th Cir.1982) and *Trigo v. FDIC*, 847 F.2d 1499 (11th Cir. 1988).[8] It is clear that under the law of the Eleventh Circuit at the time the transactions which gave rise to this case took place, federal bank regulators as receivers stood in the shoes of the entity for which they acted as receiver and were subject to state law defenses.

Then, in August, of 1989, a panel of the Eleventh Circuit decided to change the law and handed down the decision in *FSLIC v. Two Rivers Associates*, 880 F.2d 1267 (11th Cir.1989). The *Two Rivers Associates* case was decided so late in this matter that the briefs on this appeal had all been filed

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8 In *Gunter*, the Eleventh Circuit held for the first time that "as a matter of federal common law, the FDIC in its corporate capacity has a complete defense to state and common law fraud claims on a note acquired by the FDIC in the execution of a purchase and assumption transaction, for value, in good faith, and without actual knowledge of the fraud at the time the FDIC entered into the purchase and assumption agreement." (674 F.2d at 873). In *Trigo*, the Eleventh Circuit once again specificlly held:

"While federal law controls the rights and liabilities of the FDIC-Corp., state law controls the FDIC when the agency is acting as receiver of a failed bank. When acting in its corporate capacity, the FDIC is operating "under authority derived from a specific statutory scheme passed by Congress in exercise of a 'constitutional function or power' to protect and stabilize the national banking system." *Gunter v. Hutcheson*, 674 F.2d 862, (11th Cir.1982), quoting *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942). Hence, federal law applies. *See United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726, 99 S.Ct. 1448, 1457, 59 L.Ed.2d 711 (1979)(outlining test for determining when federal law governs federal agencies). As receiver of a failed bank, however, the FDIC is not pursuing a strong federal policy. The FDIC as receiver merely takes the place of any receiver that might be appointed under state law. Consequently, when acting as receiver, the FDIC is governed by state law. *FDIC v. Sumner Financial Corp.*, 602 F.2d 670, 679 (5th Cir.1979). Case law makes clear that claims against an insolvent bank must be submitted to the FDIC in its capacity as receiver of the failed bank's assets. *FDIC v. James T. Barry Co., Inc.* 453 F.Supp. 81, 82 (E.D.Wis.1978). Even the government attorney, representing the FDIC-Corp., stated in his brief that the appellants may have a valid claim against the FDIC in its receivership capacity." (Footnote 4, 847 F.2d at 1402-1403)

when the opinion was published. Suddenly, for the first time in the EleventhCircuit, the FSLIC was entitled to the protection of the *D'Oench* doctrine and the *D'Oench* doctrine was available to the FDIC and the FSLIC in their receivership capacities. In other words, only at that point was there any law to deprive the McCullough family of the property right to a fraud defense and claim and to the 486 acres and the oil leases.[9] The defense of fraud in the inducement required a jury trial. The Petitioners never had that jury trial because the district court granted a judgment as a matter of law based on legal authorities contrary to the existing law of the Eleventh Circuit.[10]

In *Harris v. McRae*, 448 U.S. 297, 65 L.Ed.2d 784, 100 S.Ct. 2671(1980), the Supreme Court found that equal protection prohibits classifications based on invidious discrimination, particularly where the classification impinges on a right or liberty protected by the Constitution. (448 U.S. at 322). In *Johnson v. Smith*, 696 F.2d 1334 (11th Cir.1983), the Eleventh Circuit held that, "A preliminary step in equal protection

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9 The Eleventh Circuit acknowledged in their opinion (App. A), that "Although not published until after briefs were filed with this court, a panel of this court has recently resolved the issue in the affirmative, holding that the FSLIC in its capacity as receiver is entitled to raise federal common law defenses premised upon the *D'Oench* doctrine. [citing *Two Rivers Associates*]." Thus, the Eleventh Circuit admitted that at no time could the McCulloughs have known that the entities they were dealing with could avoid these fraud defenses. The Eleventh Circuit further virtually admits that at the time the district court made its decision, it was wrong because under the existing law of the Eleventh Circuit, the FSLIC as receiver was not entitled to the benefit of the federal common law or of 12 USC §1823(e).

10 The district court granted summary judgment against the Petitioners on November 9, 1988. The *Trigo* decision was handed down on June 23, 1988. There is absolutely no question but that at the time the district court decided the summary judgment against the Petitioners, the law of the Eleventh Circuit *required* that New Twin City's motion for summary judgment be decided in favor of the Petitioners. Then, after this appeal was taken and after completion of the briefing on this appeal, *Two Rivers Associates* came out and the Eleventh Circuit abandoned the district court's rationale and based its decision on the *new law*.

analysis is to determine whether persons who are similarly situated are subject to disparate treatment." (696 F.2d at 1336). The Eleventh Circuit also held in *Johnson* that:

> "If the group to which the petitioner belongs is not situated similarly to the group receiving the benefit to which he claims entitlement, no equal protection problem is presented. If the two groups are similarly situated, then a *rational reason* for the disparate treatment must exist in order to avoid a denial of equal protection of the laws." (Emphasis supplied) (696 F.2d at 1337)

The only difference in the group of bank customers without state law defenses, to which group the Petitioners have been arbitrarily consigned, and the group of bank customers with state law defenses, is whether the bank with which the customers were doing business failed or remained in business. This is not a *rational* basis for such a formidable disparity of treatment. The punitive effect of the irrational classification and the resulting disparity of treatment of innocent *and defrauded* customers must outweigh any *perceived* need of the Government.

The law on which the Eleventh Circuit relied to deprive Petitioners of their common law defenses was not the law when the Petitioners signed the documents on which they are now to be held liable. The federal banking regulator, the FSLIC, could not have been relying on the *D'Oench* doctrine when it closed Old or New Twin City, and the Petitioners could not have known such law applied when they signed the documents in question, because it did not apply. This Court must not approve an irrational classification which confers the benefit of this previously unavailable immunity on the Government. Government's perceived *need* is not a substitute for law.

B. The Decision Is Contrary To The Settled Rules of Due Process Established by This Court

Is it really more important for this Court to create *no lose rules* for the Government than it is to preserve basic due process for the private citizen? The most important thing in our nation is the individual. The individual is hard reality. No amount of language can banish the individual as the basic unit of everything else. The law must serve people, not the other way around. Law has no meaning if it is not known or knowable prior to the occurrence of the conduct subsequently charged as violative of the law.

There is no justice in speaking of "secret arrangements" in this case. The Petitioners believed they had been given by Old Twin City *in writing* the things for which they bargained. The minute the Petitioners found out otherwise, they publicly and openly *raised the roof* with their protests, not only to Old Twin City, but to everyone else even remotely involved. The files of Old Twin City were full of angry letters from the Petitioners demanding that the papers be amended to include what had without their knowledge been left out of the papers they signed.

In the *Gunter* case, the *D'Oench* doctrine as originally stated by the Supreme Court in *D'Oench, Duhme & Company v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942), is described as follows:

> "In *D'Oench* the obligor had sold the bank bonds which had defaulted. To permit the bank to avoid showing the defaulted bonds on its books, the obligor gave the bank notes with the secret understanding that the notes would never be repaid. When the FDIC acquired the notes in a purchase and assumption, it sued for payment. The Supreme Court held that federal law applied to the question of the obligor's liability on the notes and

> that given the federal policy to protect the FDIC from misrepresentations designed to influence its actions and the fact that the petitioner had lent itself to a scheme to mislead the FDIC, petitioner was estopped to deny its liability on the note."

The Eleventh Circuit goes beyond any prior application of the *D'Oench* doctrine because it goes beyond exempting the FSLIC from state and federal law defenses and, solely for the benefit of the Government in the present banking environment, *creates* a "federal banking regulator holder in due course" rule.

Alabama law requires that an attempted conveyance of land must be either witnessed by one not a party to the transaction or properly acknowledged before a notary *or it is legally void*. There is nothing in Alabama law which allows the innocence of a subsequent holder to convert such a mortgage into a legally valid instrument.[11]

This rule is not harsh, however, because equity provides relief *Central Bank of the South v. Dinsmore*, 475 So.2d 842 (Ala.1985). In fact, the FSLIC recognized the correctness of the Petitioners' position and sought equitable relief from the district court. It was granted.

The problem that the "*void" at law* mortgage created for New Twin City, was that the necessity to enforce the mortgage *required* the FSLIC to seek equitable relief *and going into* equity imposed on it the corresponding duty of doing equity to the party against which it sought equitable relief. *Lee v. Tennessee, Alabama & Georgia Railway Company*, 266 Ala. 420, 96

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11 The Alabama Supreme Court has repeatedly held as follows:

> "The decisions of this court are to the effect that an attempted conveyance of lands in a manner other than as required by the statute is void. Code of 1923, §6838, et seq., Code 1940, Tit. 47 § 22 et seq." *Metropolitan Life Ins. Co. v. Estes*, 228 Ala. 582,155 So. 79; *Hollimon v. McGregor*, 225 Ala. 517, 143 So. 902; *Copeland v. Dubbs*, 221 Ala. 489, 129 So. 88." (Emphasis supplied) *Thomas v. Davis*, 241 Ala. 271, 275, 2 So.2d 616.

So.2d 804 (1957) and *Hanover Fire Insurance Company v. Street*, 234 Ala. 537, 176 So. 350 (1937). The district and circuit courts ignored the requirements of equity *on* New Twin City, considered only the equitable relief requested *against* the Petitioners and gave only the Government equitable relief.

The Eleventh Circuit with this opinion has set the law upon a dangerous course which may be simply defined as strict liability of the citizen when the *perceived* needs of the Government require it, regardless of whether the legal and equitable rules on which that liability is based were in force when the act occurred which constitutes the liability.

The United States Government is subject to the due process rules of the Fifth Amendment.

> "This Circuit follows the Fifth Circuit's lead in finding a substantive due process violation where 'rights are violated no matter what process precedes, accompanies, or follows the unconstitutional action.' *Casines v. Murchek*, 766 F.2d 1494, 1502 (11th Cir. 1985) (quoting *Augustine v. Doe*, 740 F.2d 322, 327 (5th Cir. 1984) (footnote omitted)). Defining the exact scope of a substantive due process claim is by its nature an imprecise task. The due process clause, however, has been recognized consistently as a constraint on the government's ability to use force." *Fundiller v. City of Cooper City*, 777 F.2d 1436, 1440 (11th Cir. 1985)

In *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982), the Supreme Court found that a plaintiff could not be deprived of an employment discrimination claim because there was a post-deprivation procedure established by the state which allowed a state official *for reasons beyond the complainant's control* to terminate the complainant's cause of action. The complainant was

successful in *Logan* because he challenged the "established state procedure" which destroyed his property interest. (455 U.S. at 436,102 S. Ct. at 1198)

In *Casines v. Murchek*, 766 F.2d 1494 (11th Cir. 1985), the Eleventh Circuit held that where "the claimant is deprived of due process regardless of the state's post-deprivation procedures, that a claimant has suffered a substantive violation of due process." (766 F 2d at 1502, citing with approval *Augustine v. Doe*, 740 F.2d 322 (5th Cir. 1981))

C . The Decision Is Contrary To The Rule of *United States v. Kimbrell Foods, Inc.*, 440 U.S. 715 (1979) Prohibiting The Establishement Of Federal Common Law Rules Which Interfere With Settled Commercial Expectations

In the case at bar, the Petitioners were deprived of state common law and commercial defenses and an independent cause of action based on fraud which they had under existing law (1) at the time they signed the note and mortgage, (2) at the time they made the original and renegotiated agreement with Old Twin City on which the debt was based, (3) at the time New Twin City received the non-recourse assignment of the debt, (4) at the time this lawsuit was filed, (5) at the time they filed their answer and counterclaim, (6) at the time the summary judgment was wrongfully entered against them, (7) at the time the FSLIC as receiver was named as the substitution party, (8) at the time this appeal was taken and (9) at the time the briefs on appeal were written and submitted. It was not until *after the briefs* in this case were submitted on appeal that the law was changed and the Petitioners were, through no fault of their own, deprived of their existing property rights.

There is good reason for this Court to question whether what is described in the Eleventh Circuit opinion as "federal

common law" is, in this instance, actually only a means of granting the federal State at the expense of innocent bank customers more power than the United States Constitution allows. The immemorial uneasiness of kings has always been calmed only by the grant of ever more power over their subjects. The Constitution must be the restraint on that never ending thrust for more power.

The very idea of law, as opposed to force, must require *at a minimum* that the rules imposed by the State be known in advance so that persons subject to the judicial power of the State may know what is required of them to be within the law.[12] *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121 (D. C. Cir. 1985). If the officers of the State, judicial or other, can impose on conduct which has already occurred rules developed by them subsequent to the conduct to meet their views of the policy needs of the State, then there is no law in any meaningful sense. There is only the power to impose the will of the State.[13]

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12 The Eleventh Circuit stated in its opinion that it did not find the application of the new federal common law rules it was creating to violate the prohibition in *Gunter* and *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979), against creating federal common law rules that would interfere with settled commercial expectations because the defects in the mortgage in question would not have affected the rights of an ordinary holder in due course. This is not correct. Proof that the unwitnessed mortgage was acknowledged by a notary before whom the grantors did not appear renders the mortgage legally void regardless of the status of the party relying on it. In the case of *Colburn v. Mid-State Homes, Inc.*, 280 Ala. 255, 266 So.2d 865 (1972), on which the Eleventh Circuit relies for its wrong view of the effect of holder in due course status on an invalid acknowledgment, the opinion assumed, because it was not challenged, that the acknowledgment was "efficacious" as to form. (289 Ala. at 259) Cases such as *Central Bank of the South v. Dinsmore*, 475 So.2d 842 (Ala.1985) make it clear that holders in due course of such mortgages *must* have an equitable mortgage declared or lose all rights. Moreover, in terms of the disruption of settled commercial expectations as a result of the opinion in this case, what about applying law which did not even come into being until 4 years after the occurrence of the commercial events in question to regulate those events?

13 This Court is applying law to a discrete act which was not the law applicable to that act at the time it occurred or at any relevant time related to it. This violates

Banking crisis come and go in this country. The history of the United States is replete with such crisis, all of which were, history tells us, perceived by the people of the time affected by them, as threatening the economic life of the nation. Yet, somehow, the nation survived, and did so without destroying the basic principles of due process in order to shift the cost of failures in the banking system to individual customers [14]

It is not enough to protect the poor and the minorities and the helpless and accord to *them* the protection of due process and equal protection of the laws. Selective application of Constitutional rights converts them from rights to favors. Every American, even the economically prosperous, is entitled to due process. This Court would not be faithful to its trust if it allowed the *perceived* needs of the State in the present banking environment to serve as the basis for denying the Petitioners the same due process of law it would accord the less economically fortunate, as is illustrated by the use of due process to prevent the loss of a claim for employment discrimination in *Logan v. Zimmerman Brush Company*, supra.

Strict liability cannot be justified where the only conduct of the one charged with it was to borrow money from a bank. The only difference in the Petitioners and the thou-

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due process of law. In *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952) the Supreme Court held that substantive due process is violated when the Government engages in conduct that "offend those canons of decency and fairness which express the notions of justice of English speaking peoples . . ." (342 U.S. at 169, 72 S. Ct. at 208, per Justice Frankfurter) In this case, the Petitioners are not only being deprived of rights and causes of action they had when they entered into the agreement in question, they are being forced to pay for property sold twice and conveyed to someone else.

14 The *D'Oench* doctrine derives from the case of *D'Oench, Duhme & Company v. FDIC*, supra, a 1942 case. The only historic precedent for *D'Oench* was the 1940 case of *Deitrick v. Greaney*, 309 U.S. 190, 60 S.Ct. 480, 84 L.Ed. 694 (1940). The *D'Oench* doctrine was confined to its facts, ie: knowing participation in a scheme to falsify bank records, until the 1970's when banks began to fail in large numbers.

sands of Americans who daily assert their state law rights to avoid the effects of being defrauded by banks is not anythingthe Petitioners did, but is the fact that Old Twin City failed. Yet, every possible effort is made by the federal regulators to keep secret the actual condition of banks. The free market is not allowed to operate. Borrowers have no way of knowing whether the bank with which they are doing business is about to fail or not and the State is responsible for that ignorance. In fact, the Eleventh Circuit acknowledges that the speed with which the decision to close and reopen banks must be made is due to the need to maintain secrecy and customer *confidence* in the banking system. In other words, the State *must* close and reopen banks before anyone knows how close the bank in question is to failing. 15

So, there is one set of laws for the customers of healthy banks and another set of laws for customers of banks that fail. The laws that apply when the bank fails greatly disfavor the customer and are for the benefit of bank regulators, who have kept from the customers the knowledge of the true condition of the bank, thus preventing customers from protecting themselves from doing business with a bank that may fail and causing them to lose all the normal legal and equitable protections and defenses extended to the customers of healthy banks. This is on its face a denial of equal protection of the laws.

What sort of reasonable commercial expectations can be built on such a legal maze as the Eleventh Circuit creates

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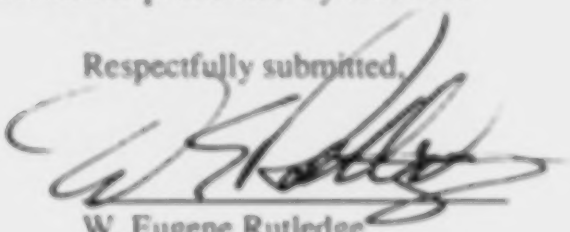
15 Bank regulators repeatedly urge as a basis for depriving the customers of a failed bank of their state law defenses that the regulators must move quickly to evaluate assets in the process of closing banks. As with so many bureaucratic myths, there is a common sense basis for challenging the accuracy of this claim. Banks do not go from healthy and sound to *failed* on an overnight basis and the regulators are supposed to be there regulating as the decline takes place. The blind acceptance of such bureaucratic excuses as these probably accounts for the fact that banking regulators have not done their jobs and for the present state of the banking system.

with the *McCullough* opinion? Procedure in commercial law is almost always substance. Certainly it is when banks are closed in midnight conferences and reopened to customers who, through no act or fault of their own, have lost all of their commercial law defenses to claims by the reopened bank and the federal regulators.

CONCLUSION

The petition for a writ of certiorari should be granted to resolve the important issues presented by this case.

Respectfully submitted,



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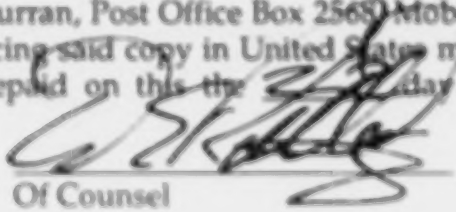
CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing "Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit" to J. Marshall Gardner, Esquire, Vickers, Riis, Murray and Curran, Post Office Box 2568, Mobile, Alabama 36652-2568 by placing said copy in United States mail with first class postage prepaid on this the [illegible] day of February, 1991.



Of Counsel

APPENDIX A

FEDERAL DEPOSIT INSURANCE CORPORATION, as manager of the FSLIC Resolution Fund, as Receiver of Twin City Savings, FSA, Plaintiff-Appellee,

v.

Robert L. McCULLOUGH and Mary Nan McCullough, Defendants-Appellants.
No. 89-7195

United States Court of Appeals,
Eleventh Circuit.

Sept. 10, 1990.

Federal Savings and Loan Insurance Corporation (FSLIC), as receiver for failed institution, brought action to recover on note secured by mortgage. The United States District Court for the Middle District of Alabama, No. 88-V-385-E, Robert E. Varner, J., granted summary judgment for FSLIC, and borrower appealed. The Court of Appeals, Anderson, Circuit Judge, held that, under *D'Oench* doctrine, borrower was precluded from asserting either bank's failure to fulfill oral commitment to convey property as part of loan agreement, or from challenging facially valid mortgage based on its improper notarization.

Affirmed.

Appeal from the United States District Court for the Middle District of Alabama.

Before TJOFLAT, Chief Judge, JOHNSON and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge:

In *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942), the United States Supreme Court held that as a matter of federal common law the Federal Deposit Insurance Corporation ("FDIC") could rely upon a defense of estoppel to prohibit parties from relying upon alleged arrangements not clearly appearing in the bank's records.1 The Court reasoned that the Congressional purpose for creating the FDIC was to protect the fiscal stability of financial institutions, thereby ensuring the availability of funds deposited within those institutions. Because unrecorded special arrangements result in the FDIC being unaware of the true level of a given bank's assets and commitments, such arrangements prevent the FDIC from rigorously overseeing the bank's operations. Therefore, to protect "[the FDIC] and the public funds which it administers against misrepresentations as to the securities or other assets in the portfolios of the banks which [the FDIC] insures or to which it makes loans," 315 U.S. at 457, 62 S.Ct. at 679, the Court concluded that a defense to a suit on a note could not be premised upon "a scheme or arrangement whereby the banking authority ... was likely to be misled." *See id.* at 460, 62 S.Ct.

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1 In *D'Oench*, the FDIC had brought suit in its corporate capacity to collect on an overdue note that it had acquired. Defending against the FDIC's suit, the party having executed the note averred that it had arranged a special, side agreement with the bank which had originally been a party to the note that the note would never be called for payment.

at 681; *see also Langley v. FDIC*, 484 U.S. 86, 92,108 S.Ct. 396, 402, 98 L.Ed.2d 340 (1988).

In the past decade an ever-increasing number of financial institutions have encountered significant difficulty maintaining solvency. As more and more of these institutions became insolvent, two federal agencies, the FDIC and its counterpart in the savings and loan industry, the Federal Savings and Loan Insurance Corporation ("FSLIC"), have been required to assume the responsibility for the assets and liabilities of these institutions. With the increased involvement of these two agencies in untangling the web created by failed institutions and by financial arrangements gone awry has come a concomitant need to determine the applicability and breadth of the defenses precluded by the Supreme Court's *D'Oench* decision.

In this case, we are called upon once again to make that determination. Concluding that the body of case law developed by *D'Oench* and its progeny effectively bars the defenses sought by appellant in this case, we affirm the judgment of the district court.

I. BACKGROUND

In August 1985, appellant Robert McCullough orally agreed to acquire several pieces of property owned by Charles Little and financed through Twin City FSB ("Old Twin City"). As part of this agreement, it was understood that McCullough would assume Little's debt of $1,030,000.00 being held by Old Twin City, and that in consideration, several pieces of Alabama real estate then owned by Little and mortgaged to Old Twin City would be transferred to McCullough. As an additional portion of this transaction, Little and Billy Lewis, Old Twin City's chief executive officer,

orally promised to transfer other property— namely, (l) 486 acres of real estate in Covington County, Alabama, that were mortgaged to Old Twin City, and (2) various oil leases that were pledged to Old Twin City—to McCullough as part of their agreed-upon deal. It is this latter oral promise, which has gone unfulfilled, which is the focal point of this litigation.

Both Little and Lewis were anxious to consummate the oral arrangement as quickly as possible. Lewis knew that federal bank examiners would soon be arriving at Old Twin City. Given the serious financial difficulties that Little had been experiencing, Lewis knew that Old Twin City's loans to Little would be viewed as presenting an unacceptable credit risk. Thus, it was imperative to Lewis that the e' transfer of Little's indebtedness be conducted expeditiously. The parties agreed that once the necessary paperwork was executed to reflect McCullough's assumption of the loan, they would conduct a formal closing at a later date to remedy any deficiencies in the paperwork.

Once the transaction had been formally approved by Old Twin City, the parties hurried to execute the necessary papers to evidence McCullough and his wife's - assumption of Little's indebtedness. Although these papers reflected that portion of the August agreement concerning the Old Twin City note, the mortgages held by Old Twin City on various pieces of property, and various rent assignments, the papers made no mention of the earlier oral agreement that the McCulloughs were to receive title to the 486 acres of property in Covington County or that the oil leases pledged to Old Twin City were to be transferred to the McCulloughs.

After execution of the papers, confusion reigned. Despite repeated requests to obtain formal notification from Old Twin City that title to the various properties had been transferred to him and that the proper documentation was

complete, McCullough never received proper documentation. Additionally, although Little continued to receive rental payments from the properties transferred to McCullough, the checks issued by Little reflecting receipt of the rental payments were rejected for insufficient funds.

To rectify these problems, McCullough again met with Little and Lewis at the Old Twin City offices on May 21, 1986. As McCullough recounts in his affidavit, he commenced the meeting by informing Lewis and Little of the problems he had been experiencing:

> I told Mr. Lewis that I was completely disgusted with the entire transaction. I told him that I had been promised that the transaction would be properly closed as soon as possible after the examiners had left Twin City Savings Bank, that the rents on the properties would be coming to me and that they would be adequate to cover the lease payments. Instead, several months had passed and I had no evidence that the property had ever been promised to me, there had never been a proper loan closing, I had seen no title insurance, the oil leases had not been assigned to me and I had up to that time received no rent.

McCullough assured Lewis that he intended to fulfill his obligations as soon as he received all of the proper paperwork from Little and the terms of the assumed note were renegotiated to reflect more favorable terms. Little's attorney explained to McCullough that the reason that McCullough had not received the closing papers (e.g., the deeds and title policies) was because Old Twin City had not yet signed documents releasing Little from the indebtedness

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When Lewis agreed to issue the releases to Little, Little's attorney provided what were represented to be the

proper documents transferring title to McCullough. McCullough accepted the documents without reviewing them. These papers made no mention of the Covington County acreage or the oil leases. Erroneously thinking that he had worked out his difficulties, McCullough returned home and issued a check to Old Twin City bringing the loan current. His problems with Old Twin City, however, continued unabated. Some time later, McCullough realized that he still had not received title to the 486 acres in Covington County and the oil leases that had been promised. Additionally, despite assurances to the contrary from Old Twin City, McCullough's requests for an amended note and mortgage as had been agreed upon during the May 21, 1986, conference went unanswered. Moreover, in October 1986, McCullough was informed that Little had declared bankruptcy and that, contrary to his earlier understandings, Little's interest in the 486 acres and oil leases had never been transferred.

On January 31, 1987, McCullough made his final payment to Old Twin City. With that payment, he informed the bank that he would make no further payments until he received an amended mortgage and note, the title to the 486 acres in Covington County and the promised assignment of the oil leases. Although Old Twin City did provide McCullough with an amended note, his other requests went unanswered.

On August 20, 1987, Old Twin City was declared insolvent and was placed in receivership by the Federal Home Loan Bank Board ("FHLBB"). The FHLBB appointed the FSLIC as receiver for the bank and directed the FSLIC to organize Twin City Savings, FSA ("New Twin City"). The FSLIC was further instructed to conduct a purchase and assumption transaction whereby New Twin City purchased substantially all of the assets and assumed substantially all of the liabilities of Old Twin City, including the note, mortgage

and assignment of rents executed by McCullough.

Finding the McCullough note to be significantly in arrears, New Twin City instituted this litigation to recover on the note.

II. PROCEEDINGS BELOW

In the district court, the McCulloughs 2 defended against New Twin City's suit by raising a multitude of defenses. They argued that the note and mortgage should be considered void because Little and Old Twin City had fraudulently induced them to assume Little's prior indebtedness. They contended that had they known that Little and Old Twin City would not convey to them the Covington County property and the oil leases, they would never have agreed to the transaction. Relying upon similar grounds, they argued that the transaction should be declared void due to a failure of consideration. In addition, the McCulloughs claimed that the mortgage being sued upon was legally insufficient because the notarization was not conducted in accordance with Alabama law.3

On cross motions for summary judgment, the district court granted judgment to New Twin City. The district court held that the *D'Oench* doctrine applied to the FSLIC and to

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2 Although only Robert McCullough was actively involved in the negotiations with Little and Old Twin City, both he and his wife were signatories to the note and mortgage.

3 The McCulloughs raised several other defenses not relevant here including a contention that the sued-upon promissory note, mortgage, and assignment were void because at the time they were transferred to McCullough, Old Twin City was not qualified to do business in Alabama under Alabama law, 1975 Ala Code § 10-2A-247. This defense was wholly without merit. 1975 Ala Code § 5-16-39; *see also Midwest Homes Acceptance Corp. v. Langdon*, 253 So.2d 29, 30-31 (Ala. 1971).

successors of the FSLIC who obtain the assets of a failed bank, and that the *D'Oench* doctrine precluded the McCulloughs' defense premised upon unconsummated, oral side agreements. Additionally, the district court, following a recent Fifth Circuit case, *FSLIC v. Murray*, 853 F.2d 1251 (5th Cir. 1988), held that when the FSLIC became the receiver of the failed bank, it achieved holder in due course status with regard to the note in question as a matter of federal common law. When the note was then assigned to New Twin City by the FSLIC, the district court reasoned, New Twin City similarly was protected from the alleged promises by being a holder in due course.

The district court also rejected the McCulloughs' argument that the mortgage in this case should be declared void because it was acknowledged by a notary public who was not present at the signing of the mortgage. Instead, the district court ruled that, under Alabama law, the bank had an equitable mortgage in the property.

III. CONTENTIONS

On appeal, the McCulloughs argue that the district court made a fundamental error in rejecting their defenses to the note. They contend that, under the circumstances of this case, the principles underlying the *D'Oench* doctrine are inapplicable to their defenses of failure to perform a condition precedent, failure of consideration, and fraudulent inducement. The federal common law protections emanating from *D'Oench* and its progeny, they assert, do not properly extend to either (1) the FSLIC as a receiver for a failed savings and loan or (2) successors of the FSLIC who obtain the assets of the failed savings and loan.

The McCulloughs further contend that, under the facts of this case, New Twin City was not entitled to an equitable mortgage. They note that it is uncontested that the

mortgage in this case was not properly witnessed or acknowledged under Alabama law. Arguing that they provided sufficient facts to establish that Old Twin City engaged in fraud, they claim that New Twin City, as the successor to Old Twin City's rights, cannot call upon equity to protect its interest.

IV. RELEVANT SUBSEQUENT EVENTS

Since the district court's ruling on New Twin City's motion for summary judgment, several significant occurrences have transpired which simplify our discussion of many of the issues in this case. As a result, prior to embarking into an analysis of the various arguments raised by the appellants, some discussion of these occurrences and their relevance to this litigation is in order.

A. *Identifying the Real Party in Interest*

Subsequent to the date that the district court issued its opinion, motions have been filed by various federal entities seeking to substitute themselves for New Twin City Bank. Accordingly, we deem it advisable as a preliminary matter to determine exactly who, at this point, is the real plaintiff party in interest and appellee in this litigation.

New Twin City Bank commenced this litigation against the appellants and was the plaintiff party on November 9, 1988, when the district court issued its ruling on the outstanding motions for summary judgment. The appellants, rather than immediately appealing the district court's ruling, timely filed a motion for reconsideration with the district court. This motion was denied on March 3, 1989.

On November 9,1988, the same date that the district

court issued its ruling in favor of New Twin City Bank, the FHLBB determined that New Twin City, following in the footsteps of its predecessor, Old Twin City, was insolvent. The FSLIC again was appointed receiver. On December 9, 1988, with the appellants' motion for reconsideration still pending in the district court, the FSLIC filed a motion to substitute itself as party plaintiff in lieu of New Twin City. This motion was granted on December 14, 1988, two and one-half months prior to the denial of appellants' motion for reconsideration.

Thus, notwithstanding the fact that the FSLIC had not yet entered the litigation at the time the district court issued its ruling on New Twin City's motion for summary judgment, the FSLIC as receiver for New Twin City was the actual plaintiff party at the time the district court issued its *final* order in this case denying the outstanding motion for reconsideration. See *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 103 S.Ct. 400, 403, 74 L.Ed.2d 225 (1982) (district court's order is not a final, appealable order when timely filed motion to reconsider pursuant to Fed. R.Civ.P. 59(e) remains pending); *cf. In re Savers Federal Savings & Loan Association*, 872 F.2d 963, 964 (11th Cir.1989) (upon being appointed conservator of failed bank, the FSLIC automatically becomes party to lawsuit involving that bank).

Indeed, a parallel can be drawn between the proceedings in this case, and those found in *FSLIC v. Two Rivers Associates*, 880 F.2d 1267 (11th Cir.1989). In *Two Rivers Associates*, the defaulted notes and mortgages in question had been issued by the Sunrise and Loan Association of Florida ("Old Sunrise"). The FHLBB declared Old Sunrise insolvent and appointed the FSLIC as receiver. The FSLIC reorganized Old Sunrise into the Sunrise Savings and Loan Association ("New Sunrise") and transferred all of Old Sunrise's assets and liabilities to New Sunrise.

New Sunrise brought suit in state court to enforce the promissory notes and foreclose the mortgages. The state court issued a partial summary judgment finding the notes and mortgages valid and in default, and directed a public sale of the properties if the debt was not satisfied within three days. Simultaneously, the district court granted a motion allowing the debtors to file amended answers.

The debtors filed amended answers, and also moved for reconsideration of the grant of summary judgment. While the motion for reconsideration was pending, the FHLBB determined that New Sunrise was insolvent and appointed the FSLIC as receiver for the purpose of liquidating New Sunrise's assets and making payments of its liabilities.

Before the state court ruled on the motion to reconsider, the FSLIC was substituted for New Sunrise in the case and the case was removed to federal court. When reanalyzing the issues on summary judgment, both the district court and a panel of this court reviewed the case from the perspective of the FSLIC, and not New Sunrise, being the proper party in interest.

Hence, we need not on this appeal determine whether the district court was correct in following those courts that have held that successors to the FSLIC or the FDIC are entitled to the same common law defenses as may be asserted by the FSLIC or the FDIC. *See, e.g., Porras v. Petroplex Savings Ass'n*, 903 F.2d 379 (5th Cir.1990) (holding that "[c]laims and defenses barred as to the FSLIC by the *D'Oench Duhme* doctrine are similarly barred as to private parties who purchase the assets of the failed institution from the FSLIC"); *FDIC v. Newhart*, 892 F.2d 47 (8th Cir.1989) (according the FDIC's federal holder in due course status to a private party purchasing notes from the FDIC). Rather, our focus is merely limited to those defenses that could be asserted by the FSLIC,

as real party in interest. Moreover, because there had not yet been a final judgment in this case at the time the FSLIC became a party, the FSLIC is entitled on this appeal to raise any federal common law defenses it may possess.4 Compare *Olney Savings & Loan Ass 'n v. Trinity Banc Savings Ass 'n*, 885 F.2d 266, 275 (5th Cir. 1989) (holding that the FSLIC does not possess "a right, title, or interest" in a challenged instrument and thus cannot assert federal common law defenses when, at the time the FSLIC enters the litigation, there already is a final judgment holding the challenged instrument to be void); *Grubb v. FDIC*, 868 F.2d 1151, 1159 (10th Cir.1989) (same holding with respect to the FDIC).

B. *D'Oench Doctrine Protections Extend to the FSLIC as Receiver*

[2] Given that we have identified the FSLIC as the real party in interest at the time of the district court's final judgment, the next question to be addressed is whether the FSLIC as receiver for a failed savings and loan institution is entitled to rely upon the *D'Oench* doctrine and raise federal common law defenses to defeat state law claims of fraudulent inducement and failure of consideration when suing upon a note in default. Although not published until after briefs were filed with this court, a panel of this court has recently resolved this

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4 Since this appeal was docketed, the FSLIC has been abolished by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub.L. No. 101-73, § 401(a); 103 Stat. 183, 354 (1989) and the FDIC has been substituted in place of FSLIC. For all practical purposes, this substitution has no bearing upon our analysis of the issues presented. Although the FSLIC as receiver was never entitled to rely upon the statutory defenses that the FDIC is entitled to raise, *see* 12 U.S.C. § 1823(e), *as amended* by FIRREA, Pub.L. No. 101-73, § 217(4), 103 Stat. at 256, FSLIC was entitled to assert its federal common-law defenses emanating from *D'Oench* and its progeny. *See Two Rivers Associates*, 880 F.2d at 1274-77. Both § 1823(e) and the *D'Oench* common law doctrine are designed to further the same objective of protecting the federal banking regulatory authority from undocumented agreements that impeded the regulatory authority's ability to perform its Congressionally mandated functions. Because section 1823(e) is merely a codifi-

issue in the affirmative, holding that the FSLIC in its capacity as receiver is entitled to raise federal common law defenses premised upon the *D'Oench* doctrine. *Two Rivers Associates*, 880 F.2d at 1274-77 .

In reaching this conclusion, the *Two Rivers Associates* court first observed that the policy reasons underlying the Supreme Court's decision in *D'Oench* leading to the development of a federal common law estoppel defense for the FDIC were equally applicable to the FSLIC: "since the FSLIC has parallel duties and power with respect to savings and loans as the FDIC has with banks, the federal policy should protect the FSLIC to the same extent that it protects the FDIC." *Two Rivers Associates*, 880 F.2d at 1274-75) (footnote omitted). Next, the *Two Rivers Associates* court rejected the suggestion appearing in our prior cases that the *D'Oench* doctrine should be available to the FSLIC or the FDIC only when it litigates in its capacity as corporate insurer and not in its receivership capacity. *See Trigo v. FDIC*, 847 F.2d 1499, 1502 n. 4 (11th Cir.1988); *Gunter v. Hutcheson*, 674 F.2d 862 (11th Cir.), *cert. denied*, 459 U.S. 826, 103 S.Ct. 60, 74 L.Ed.2d 63 (1982). Drawing upon recent Supreme Court authority, *see Langley v. FDIC*, 484 U.S. 86, 108 S.Ct. 396, 98 L.Ed.2d 340 (1987), the *Two Rivers Associates* court discerned no basis for distinguishing between whether suit was being brought in the FSLIC's corporate or receivership capacity. In either instance, the *Two Rivers Associates* court noted that the federal policy underlying the *D'Oench* doctrine supported its application. The court ob-

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cation of *D'Oench* and its progeny, defenses premised upon § 1823(e) and *D'Oench* are usually construed in tandem. *Olney v. Savings & Loan Ass'n v. Trinity Banc Savings Ass'n*, 885 F.2d 266, 274 (5th Cir.1989); *Beighley v. FDIC*, 868 F.2d 776, 784 (5th Cir.1989). *See Langley v. Federal Deposit Insurance Corp.*, 484 U.S. 86, 90-93, 108 S.Ct. 396, 401-02, 98 L.Ed.2d 340 (1988). The FIRREA amendments allow the FDIC as receiver to rely upon § 1823(e); thus, it matters not whether we refer to the appellee as the FSLIC or the FDIC. Therefore, for convenience sake only, we refer to the FSLIC as the appellee in this matter.

served that the *D'Oench* doctrine embodies the recognition that an unrecorded agreement hinders the ability of the federal regulatory authorities to make swift and reliable evaluations of the assets of a given financial institution and that the ability to make such assessments was imperative both when the FDIC or the FSLIC was insuring a bank and when the FDIC or the FSLIC was taking over a failed bank. In short, "the federal policy protects the FDIC or the FSLIC's reliance on the bank records even before the institution fails.... [O]ne of the harms which this rule protects against occurs no later than the time at which [the FSLIC] conducts its first bank examination that is unable to detect the recorded agreement." 880 F.2d at 1277 (citations, quotations, and footnote omitted).

V. APPLICATION OF THE *D'OENCH* DOCTRINE BARS THE MCCULLOUGHS' DEFENSES TO THE NOTE

Having determined that the FSLIC was the real party in interest at the time of the district court's final judgment and that the FSLIC even in its receivership capacity is entitled to raise federal common law defenses derived from *D'Oench*, we now turn to the precise scope of those defenses.

Although the precise claim that was defeated in *D'Oench* addressed a private party's claim premised upon a secret agreement that a note need not be repaid, the policy considerations leading to the development of federal common law in *D'Oench* have resulted in extension of the *D'Oench* estoppel doctrine well beyond that precise factual setting. Borrower defenses premised upon other purported, unwritten statements leading to claims of fraudulent inducement or failure of consideration are now also generally precluded by *D'Oench* and its progeny. *See, e.g., FSLIC v. Murray*, 853 F.2d 1251, 1255 (5th Cir.1988) (failure of consideration); *FDIC v. McClanahan*, 795 F.2d 512, 516 (5th Cir.1986) (same); *Gunter*,

674 F.2d at 874 (fraud). Such defenses if allowed against the FSLIC or the FDIC would, like the defense at issue in *D'Oench*, contravene the primary federal policy that the FSLIC and the FDIC must be able to rely upon financial institutions' records in order to best protect the public funds they administer. *See Two Rivers Associates*, 880 F.2d at 1274-75. The evil to be prevented in any of these situations is precisely the same: the private party seeks to rely upon unrecorded promises or schemes that purport to impose obligations other than those appearing in the bank's records upon the financial institution.

[3] Whether a borrower's defense is barred by the *D'Oench* doctrine depends upon whether the purported agreement relied upon by the private party was ever memorialized in writing or otherwise made explicit such that the FSLIC or the FDIC would have knowledge of the bank's obligations during an evaluation of the bank's records.5 *See Two Rivers Associates*, 880 F.2d at 1275. If the bank's records reveal that the bank has agreed to certain additional obligations, then the *D'Oench* estoppel doctrine would not preclude a borrower's claim that the bank had not satisfied those additional obligations. *Id.* (citing *Howell v. Continental Credit Corp.*, 655 F.2d 743, 746 (7th Cir. 1981)). In such an instance, the bank's responsibilities are clearly delineated by documents in that bank's files manifesting the bank's reciprocal obligations.

On the other hand, if side agreements or other inducements cannot be determined by a review of the bank's files, then it cannot be said, without additional proof, that the FSLIC or the FDIC was aware of the additional commitments

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5 Under this inquiry, it is irrelevant whether the FSLIC or FDIC has knowledge of the unrecorded agreement or scheme at the time it acquires the note. *Two Rivers Associates*, 880 F.2d at 1275 n. 12; *see Langley*, 484 U.S. at 93-95, 108 S.Ct. at 402-03; *FDIC v. Merchants National Bank of Mobile*, 725 F.2d 634, 640 (11th Cir. 1984)

allegedly made by the bank. Given federal policy favoring reasonable reliance upon existing bank records evidencing all of the bank's existing commitments, *see Two River Associates*, 880 F.2d at 1275, such unrecorded commitments will not be honored.

[4] While on its face, such a policy may appear inequitable to those parties relying upon a bank's unrecorded promises or arrangements, it must be recalled that a party who accedes to a bank's oral inducements without memorializing the same is to at least some extent. responsible. Because such a party "lent himself to a scheme or arrangement whereby the banking authority ... was likely to be misled," that party cannot rely upon that same scheme or arrangement to defend against the banking authority's subsequent actions. *See Langley v. FDIC*, 484 U.S. at 92, 108 S.Ct. at 402. The *D'Oench* doctrine "favors the interests of depositors and creditors of a failed bank, who cannot protect themselves from secret agreements, over the interests of borrowers, who can." *Bell & Murphy & Assoc. v. Interest Bank Gateway*, 894 F.2d 750, 754 (5th Cir.1990), *pet'n for cert. filed*, (No. 89-1893). Thus, neither a claim of lack of intent to deceive banking authorities nor a claim that the purported secret arrangement was not by its nature fraudulent is sufficient to defeat application of the *D'Oench* doctrine.6 *Campbell Leasing, Inc. v. FDIC*, 901 F.2d 1244, 1248 (5th Cir.1990); *Beighley v. FDIC*, 868 F.2d 776, 784 (5th Cir.1989); *see also Chatham Ventures, Inc. v. FDIC*, 651 F.2d 355, 361-62 (5th Cir. Unit B 1981).

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6 There may be instances in which the borrowers are wholly innocent of any misconduct and, additionally, cannot be said to have lent themselves to arrangements that might deceive the banking authorities. *See, e.g., FDIC v. Meo*, 505 F.2d 790, 793 (9th Cir.1974); *cf. Langley v. FDIC*, 484 U.S. at 93-95, 108 S.Ct. at 402-03 (observing that a borrower's claim of fraud in the factum would not be barred by *D'Oench*). Because as we discuss in the text, *infra*, slip opinion page 4890, page ____, McCullough clearly does not fall within this category, we need not address the parameters of this exception here

[5] Looking to the facts of this case, it is readily apparent that the FSLIC was entitled to avail itself of the *D'Oench* doctrine. To put the FSLIC on notice that a bank had promised to convey additional property in consideration for the execution of the note, mortgage and rent assignments, the borrower must be able to point to documents that "clearly manifest[ed] the bilateral nature of the [parties'] rights and obligations." *Two Rivers Associates*, 880 F.2d at 1275, quoting *Howell v. Continental Credit Corp.*, 655 F.2d at 747. Within Old Twin City's files, however, was nothing that would indicate the bank's firm obligation to transfer the Covington County property and the oil leases to the McCulloughs.

The McCulloughs argue that two documents in the bank files manifest the obligation to transfer the additional property. The first document, a memorandum given to McCullough in August 1985, was written prior to the execution of the relevant note, mortgage and rent assignment, and merely alludes to "new appraisals" and a "transfer of oil runs." Subsequently, when the note, mortgage, and rent assignments at issue in this case were executed, it is undisputed that these documents contained no reference to either the Covington County property or to the oil leases. Thus, even if we were to assume that the vague allusions in the August memorandum could be construed as evidence that at one point in time there was discussion of possibly transferring some undefined "oil runs", we nonetheless conclude that there is no *explicit documentation* evidencing Old Twin City's *obligation* to transfer specific properties to the McCulloughs. *See Two Rivers Associates*, 880 F.2d at 1275. Similarly, the second document, a letter written in September 1986, mentions only an "amendment to the mortgage." It too is insufficient as a matter of law to give notice to the FSLIC that Old Twin City had made a fixed commitment to act in a manner other than that set forth in the executed documents. *Id.*

Finally, it must be noted that McCullough is at least partially responsible for the predicament in which he finds himself. McCullough was active throughout the actual negotiations leading up to the consummation of the deal at issue and could easily have insisted that inclusion of the Covington County property and the oil leases be made explicit in the papers. *See Two Rivers Associates*, 880 F.2d at 1274. Moreover, McCullough freely concedes that he executed the mortgage and note without insisting upon the formalities of a loan closing "as an accommodation to Twin City Savings Bank and Mr. Little" and that he knew that speed was essential to the bank due to an impending visit from bank examiners. Additionally, McCullough admits that he had the opportunity to examine the documents at closing and did not avail himself of this opportunity. All told, it is apparent that McCullough voluntarily associated himself with an arrangement that had the potential to mislead the FSLIC as to Old Twin City's obligations. *See Langley v. FDIC*, 484 U.S. at 93,108 S.Ct. at 402 ("one who signs a facially unqualified note subject to an unwritten and unrecorded condition upon its repayment has lent himself to a scheme or arrangement that is likely to mislead the banking authorities, whether the condition consists of a counterpromise (as in *D'Oench, Duhme*) or of the truthfulness of a warranted fact"); *FDIC v. McClanahan*, 795 F.2d at 516 (borrower who acts recklessly cannot rely upon defenses of failure of consideration or fraud in the inducement in an attempt to overcome application of the *D'Oench* doctrine).

Accordingly, we conclude that the McCulloughs' defenses of failure to perform a condition precedent, failure of consideration, and fraudulent inducement all are barred by the FSLIC's invocation of the *D'Oench* doctrine.

VI. APPLICATION OF *D'OENCH* DOCTRINE TO BAR MCCULLOUGH'S DEFENSE TO THE MORTGAGE

[6] The McCulloughs' last defense concerns a legal insufficiency in the mortgage that was executed to secure the now defaulted note. Although facially appearing to be a valid, legal mortgage, the parties agree that the mortgage was not witnessed or acknowledged in proper fashion. At the time that the mortgage was signed, the notary whose signature appears on the mortgage was, in fact, not present. Under Alabama law, the McCulloughs argue, this flaw renders the mortgage insufficient to pass legal title to the real estate described in the mortgage. *See Central Bank of the South v. Dinsmore*, 475 So.2d 842 (Ala. 1985).

Although the error in acknowledgement might render the mortgage voidable were this suit involving two private parties litigating under state law, we conclude that the FSLIC's federal common law defenses bar the McCulloughs' claim of improper notarization. On its face, the mortgage appears valid. As such, it would have been impossible for the bank examiners to have had any suspicions concerning the legal sufficiency of the mortgage during an examination of Old Twin City's records. Additionally, the flaw in the mortgage is one that the McCulloughs could have easily guarded against by merely waiting to sign the mortgage until a notary's presence was secured. Because the McCulloughs were aware that the document they signed was a mortgage, we are constrained to conclude that the McCulloughs lent themselves to a scheme or arrangement (i.e., that the mortgage would be signed without the presence of a notary and that a notary would later affix her signature) that was likely to mislead the banking authorities (by leading them to believe that the mortgage was legally valid).7 Ac-

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7 The McCulloughs make no argument that the bank was guilty of fraud in the

cordingly, the McCulloughs' claim is barred by the D'Oench doctrine.

In concluding that application of the *D'Oench* doctrine in this case is appropriate, we observe that application of federal common law cannot be viewed as being inconsistent with the settled expectations of individuals engaging in transactions under state law. *See Gunter*, 674 F.2d at 872. Under Alabama law, the failure to acknowledge a mortgage properly does not render the mortgage void or even voidable in all cases.8 *See, e.g., Central Bank of the South*, 475 So.2d at 846-47. For example, under Alabama law, when a bona fide purchaser for value takes a mortgage without notice of errors in the mortgage's acknowledgement not readily appearing upon the face of the mortgage, those errors are legally insufficient to defeat claims of that purchaser. *Colburn v. Mid-State Homes, Inc*, 289 Ala. 255, 266 So.2d 865, 869-70 (1972). Alabama law also provides that "the protection given a holder in due course is awarded to the holder of a mortgage as well as the note which the mortgage secures." *Hardy v. Gissendaner*, 369 F.Supp. 481, 483 (M.D.Ala.1974), *aff'd*, 508 F.2d 1207 (5th Cir.1975).

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factum—i.e., that they were fraudulently led to believe that the mortgage they were signing was not a legal document—and that a notary, had she been present, would have prevented such a fraud from occurring. Although it is possible that a claim of fraud in the factum would survive FSLIC's invocation of the *D'Oench* doctrine, *see Langley v. FDIC*, 484 U.S. at 93-94, 108 S.Ct. at 402, we need not decide this issue.

8 Were it the case that the acknowledgement flaw in the mortgage resulted in the mortgage being void, then we recognize that a serious argument could be made that federal common law would provide no respite for FSLIC. In such an instance, the instrument possessed by FSLIC would be wholly without legal consequence, "thus leaving no 'right, title or interest' that could be 'diminished or defeated.'" *Langley v. FDIC*, 108 S.Ct. at 402; *see FDIC v. Bracero & Rivera, Inc.*, 895 F.2d 824 (1st Cir.1990); *cf. Olney Savings & Loan Ass'n v. Trinity Banc Savings Ass'n*, 885 F.2d at 275; *Grubb v. FDIC*, 868 F.2d at 1159.

We have noted on prior occasions that, in application, the federal common law defenses available to the FDIC are analogous to the defenses that could be raised by a holder in due course under state law. *See FDIC v. Gulf Life Ins. Co.*, 737 F.2d 1513, 1517-18 (11th Cir.1984); *Gunter*, 674 F.2d at 872. In both *Gulf Life* and *Gunter*, borrowers contended that the FDIC's invocation of federal common law to defeat such borrower state law defenses of estoppel, waiver, unjust enrichment, fraud in the inducement, and failure of consideration would upset settled expectations under state law. In rejecting these arguments, we observed that according the FDIC protection from these claims granted the FDIC no greater protections than those offered to a holder in due course under state law. Recognizing that a transfer of an obligation to a holder in due course was a much more likely occurrence than the assumption of the obligation by the FDIC, we concluded that "little dashing of commercial expectations would result from a uniform federal rule protecting the FDIC from such defenses." 9 *Gulf Life Insurance Corp.*, 737 F.2d at 1518.

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9 In both *Gulf Life* and *Gunter*, we analyzed the appropriateness of according the FDIC with federal common law defenses by examining the three factors identified in *United States v. Kimbell Foods*, 440 U.S. 715, 99 S.Ct. 1448 (1979): "whether the federal program was one which by its nature required nationwide uniformity, whether adopting the state law would frustrate the specific objectives of the federal program, and whether applying a federal rule would disrupt commercial relations predicated on state law." *Gunter*, 674 F.2d at 868. Addressing whether the FDIC should be able to assert federal common law defenses emanating from *D'Oench*, we observed that the first two of the *Kimbell Foods*' factors strongly favored the application of a uniform federal rule protecting the FDIC. *See Gulf Life*, 737 F.2d at 1517-18; *Gunter*, 674 F.2d at 869-72. Those conclusions are equally *a propos* here. While consideration of the third factor frequently leads to a much more equivocal response as to the appropriateness of constructing a federal common law defense, *see Gulf Life*, 737 F.2d at 1518; *Gunter*, 674 F.2d at 872, we conclude that, for the reasons set forth in the text, any disruption to commercial expectations is at best minimal in this case.

Drawing upon this analogy, several circuits have concluded that the FDIC and the FSLIC, regardless of whether operating in a corporate or receiver capacity, are clothed under federal common law with the same defenses that would be accorded a holder in due course under state law. *See, e.g., Campbell Leasing, Inc. v. FDIC*, 901 F.2d 1244 (5th Cir.1990); *Firstsouth, F.A. v. Aqua Construction, Inc.*, 858 F.2d 441, 443 (8th Cir.1988); *FSLIC v. Murray*, 853 F.2d 1251, 1256-57 (5th Cir.1988); *FDIC v. Wood*, 758 F.2d 156, 159 (6th Cir.), *cert. denied*, 474 U.S. 944, 106 S.Ct. 308, 88 L.Ed.2d 286 (1985). As the Fifth Circuit explained in *Murray*:

> [P]roviding FSLIC with at least the status of a holder in due course promotes the necessary uniformity of law in this area while it counters individual state laws that would promote a basic FSLIC objective: promoting confidence and stability in financial institutions. *See United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728-29, 99 S.Ct. 1448, 1458-59 [59 L.Ed.2d 711] (1979); *Gunter*, 674 F.2d at 868-69. Moreover, clothing FSLIC with at least holder in due course status does not trample commercial expectations of note makers such as appellants. *See Kimbell Foods*, 400 U.S. at 729, 99 S.Ct. at 1459. A maker must anticipate that his note may be transferred to holder in due course; the maker therefore suffers no prejudice if the FSLIC is granted those rights. *See Wood*, 758 F.2d at 161; *Gunter*, 674 F.2d at 872.
>
> . . . . . .
>
> Finally, a uniform rule such as this serves the goals of predictability and rationality more effectively than the alternative of invalidating individual defenses as they arise. Establishing at least holder in due course status for the FSLIC allows it, the public and the courts to draw on a well-developed body of commercial law

> when determining which state law defenses are clearly unenforceable against the FSLIC.

853 F.2d at 1256-57.

Were we to accord FSLIC with holder in due course status in this case,10 it is readily apparent that the McCulloughs' claim concerning the improper acknowledgment would fail under Alabama law. For one thing, as a holder in due course, the FSLIC could not be said to have had notice of the irregularity, which the McCulloughs now complain. *See* 1975 Ala.Code § 7-3-304(4)(d). More significantly, the McCulloughs' claim concerning an irregularity in the mortgage is not cognizable against a holder in due course. *See, e.g., Colburn v. Mid-State Homes, Inc.*, 266 So.2d at 869 ("the holder in due course of a negotiable note secured by a mortgage takes the mortgage subject to only those defenses which could be raised by the mortgagor *against the note itself*") (emphasis added). Hence, application of the FSLIC's common law defenses cannot be said to be so disruptive of settled expectations of how Alabama law would affect the commercial transaction at issue such that reliance upon federal common law should be questioned.

10 Because the note and mortgage were acquired through a bulk transfer, the FSLIC could not be considered a holder in due course under state law. *See* 1975 Ala.Code § 7-3-302. This fact, however, is inconsequential to the determination that the FSLIC should be treated as a holder in due course under *federal common law. Campbell Leasing*, 901 F.2d at 1249. If the FSLIC could satisfy state law holder in due course requirements, there would be no reason to invoke federal common law as state law would be sufficient. Rather, the federal common law doctrine granting the FSLIC or the FDIC holder in due course status is designed to afford the FSLIC and the FDIC the same protections to v.which they would be entitled had they satisfied those state law requirements. Of course, holder in due course status does not automatically and irrevocably attach to the FSLIC and the FDIC by the agencies' very nature. For example, if the FSLIC had been actively involved in creating the irregularity appearing in the mortgage, this actual participation in the creation of the flaw would preclude the FSLIC from claiming holder in due course status.

VII. CONCLUSION

For all of the reasons discussed above, the judgment of the district court is affirmed.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

TWIN CITY SAVINGS, FSA, A Federal Mutual Association,	)	
Plaintiff,	)	
VS.	)	CIVIL ACTION NO. 88V-385-E
ROBERT L. McCULLOUGH; ET AL.,	)	
Defendants.	)	

ORDER AND JUDGMENT

In accordance with the Opinion entered in the above-styled cause on this date, it is ORDERED, ADJUDGED and DECREED by this Court:

1. That Defendants' Motions for Summary Judgment filed herein September 6, 1988, be, and the same are hereby, denied.

2. That Plaintiff's Motion for Summary Judgment filed herein July 28, 1988, be, and the same is hereby, granted and judgment is hereby entered in favor of Plaintiff, Twin City Savings, FSA, against Defendants, Robert L. McCullough and Mary Nan McCullough, in the amount of $1,030,000.00, plus interest.

3. That costs of this action are hereby taxed against Defendants, for which execution may issue.

4. That the assignment of rents made by Defendants are valid and enforceable by Plaintiff, Twin City Savings, FSA.1/

The Court hereby reserves ruling on the question of attorneys' fees for Plaintiff's counsel.

DONE this 9th day of November, 1988.

S/ Robert E. Varner
UNITED STATES DISTRICT JUDGE

1/ Plaintiff, in its Complaint, demanded an order to each lessee or tenant on the mortgaged property to commence paying rent directly to Plaintiff. However, as these lessees and tenants are not parties to this action and, thus, not properly within the jurisdiction of this Court, this request will be granted only to the extent shown in Paragraph 4 of this Order and Judgment.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

TWIN CITY SAVINGS, FSA, A Federal Mutual Association,	)	
Plaintiff,	)	
VS.	)	CIVIL ACTION NO. 88V-385-E
ROBERT L. McCULLOUGH; ET AL.,	)	
Defendants.	)	

OPINION

This cause is now before the Court on the parties' motions for summary judgment filed herein July 28 and September 6, 1988, and on the briefs and other materials submitted in support of and in opposition to said motions.

The facts of this case are briefly as follows. On October 31, 1985, Defendants executed a promissory note whereby they promised to pay Twin City Savings Bank, FSB [Twin City], $1,030,000.00, plus interest, on or before October 31, 1987. As security for said note, Defendants executed a mortgage on certain parcels of real property located in various places throughout Alabama. As additional security for the indebtedness, Defendants assigned the leases and rents due from said properties to Twin City. On May 21, 1986, the loan agreement was modified by the parties, whereby the interest rate was changed and the method of payments was changed to monthly payments based upon a 20-year amortization with the full balance becoming due and payable in five years or on May 30, 1991. In August, 1987, the Federal Home Loan Bank Board [Board] appointed the Federal Savings and Loan Insurance Corporation [FSLIC] as the sole receiver for Twin City. The FSLIC thereby took control of Twin City and succeeded to all the rights, titles, powers and privileges of Twin City. On August 20, 1987, the FSLIC, at the direction of the Board, organized Twin City Savings,

FSA [Plaintiff herein], which thereby acquired all the rights under the promissory note and the aforementioned assignment of leases and rents. On April 20, 1988, Plaintiff filed suit herein alleging that Defendants are in default on said note and demanding judgment against Defendants for the sum of $1,189,156.15, plus interest, costs and a reasonable attorney's fee.* Plaintiff also seeks an order declaring its right pursuant to the aforementioned assignment of rents and an order to each lessee or tenant on the mortgaged property to commence paying rent directly to Plaintiff. Defendants filed an answer and counterclaim herein on June 30, 1988, and amended said counterclaim on August 22, 1988. Defendants contend that Plaintiff's claim is barred by the defense of laches; that Plaintiff is not entitled to equitable relief because of the defense of unclean hands; that the aforementioned mortgage and note are invalid because of a failure of consideration; and that the Defendants were fraudulently induced by Twin City to execute the aforementioned note and mortgage.1/ Defendants pray that the Court will declare the promissory note and mortgage to be void and of no force and effect and declare that the said mortgage cannot operate as an equitable lien on the real property to which it refers. Defendants have not made an interest payment on said

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* Upon default by Defendants, all payments were accelerated by virtue of a clause in the note.

1/ Defendants also asserted the defense of lack of jurisdiction, lack of standing, failure to allege a justiciable controversy and the failure of Plaintiff to qualify to do business in Alabama. All of these defenses were previously ruled on by this Court in an Order dated June 15, 1988, denying Defendants' motion to dismiss. Defendants also assert that the promissory note was modified by a written agreement and that Plaintiff has not sought to enforce the note according to those terms. In an affidavit submitted by the Plaintiff on July 25, 1988, Jim H. Gibson, President of Plaintiff, admitted that the note was modified in that the interest rate was lowered and the payment schedule changed. Based on this admission, this defense does not have any merit and requires no further discussion.

loan since January 31, 1987, and neither Twin City nor Plaintiff has ever received any rents pursuant to the assignment of leases and rents.

To prevail on a motion for summary judgment, the moving party must show that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. Livernois v. Medical Disposables, 837 F.2d 1018 (11th Cir. 1988).

LAW

Defendants contend that the aforementioned note, mortgage and assignment should be voided because Defendants were fraudulently induced to enter into these agreements. The basis for this argument, apparently, is some alleged promises and representations made by the President of Twin City, Billy Lewis, to the Defendants. Said promises concern another parcel of land that was to be transferred to the Defendants, as well as an assignment of oil leases. These promises were alleged to have taken place at or before the time the note and mortgage were signed and are not included in the bank records of Twin City.

As stated earlier, FSLIC was appointed receiver for Twin City in August, 1987. At the same time, Plaintiff was chartered by the Board, and all of the assets of Twin City were acquired by Plaintiff. Pursuant to the D'Oench doctrine, defenses to promissory notes based upon agreements not in the official records of the bank are ineffective when asserted against FSLIC or some entity standing in the shoes of FSLIC. This doctrine was a product of the Supreme Court decision, D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447 (1942).

In D'Oench, the Supreme Court held that a person who, for the accommodation of a bank, executes a note which in form is a binding obligation should be estopped from raising defenses based on alleged secret agreements he had with the officers of failed banks regarding the enforceability of the instrument. This doctrine, as it applies to the FDIC, has been codified in 12 U.S.C. § 1823(e). This particular section does not apply to the FSLIC, but the federal courts have extended the doctrine to apply to cases brought

by the FSLIC [Federal Savings & Loan Ins. Corp v. Port Allen Development, 684 F.Supp. 439 (MD La. 1988); Federal Savings & Loan Ins. Corp. v. Hsi, 657 F. Supp. 1333 (ED La 1986)] or to successors of FSLIC who obtain the assets of the failing bank [Federal Deposit Ins. Corp. v. Gardner, 606 F. Supp. 1484 (SD Miss. 1985)].

The D'Oench doctrine applies in the case sub judice to estop the Defendants from defending against the note, mortgage and assignment because of the alleged promises of the President of Twin City to include other property and oil leases in their agreement. The note, mortgage and assignment are complete and absolute, and the D'Oench doctrine precludes the Defendants from raising any agreements made by Twin City about which the Plaintiff has no knowledge. Defendants' defense of failure of consideration is based on these alleged agreements and, thus, must fail for the reasons given above.

The Defendants also have alleged that they were fraudulently induced to enter into the note, mortgage and assignment because Defendants were told this property and oil leases were to be included in the deal. The United States Court of Appeals for the Eleventh Circuit held in Gunter v. Hutchinson, 674 F.2d 862 (1982), that federal common law provides the FDIC with a complete defense to fraud claims on a note acquired in a purchase and assumption transaction similar to the purchase and assumption in which Plaintiff acquired Twin City's assets. Gunter involved representations allegedly made by bank officers to induce the makers of a note to enter into the loan transaction. The Court found that federal common law governed the case and disallowed the fraud defenses.

In a very recent decision, the United States Court of Appeals for the Fifth Circuit affirmed a decision granting holder in due course status to FSLIC as a matter of federal common law. Federal Savings & Loan Ins. Corp. v. Murray, No. 86-3021, Slip Op. (5th Cir. 1988). In Murray, the Court held that such treatment for the FSLIC was necessary to promote confidence and stability in financial institutions when the FSLIC was arranging a purchase and assumption transaction for a failing bank. This was precisely

what the FSLIC did in the case sub judice. Of course, giving holder in due course status to the Plaintiff in this action would bar all the claims and defenses of the Defendants. It is clear that Defendants cannot rely on the alleged promises of Twin City's President as a defense to the note, mortgage and assignment made the basis of this litigation. This result is reached applying both the D'Oench doctrine and the federal common law as it has evolved, as shown by the Gunter and Murray decisions.

Defendants also contend that the mortgage involved in this lawsuit should be declared void because it was improperly acknowledged. Plaintiff admits that the mortgage was acknowledged by a notary public who did not see the Defendants sign the mortgage. Plaintiff contends that it retains an equitable mortgage on the property despite the technical deficiency regarding the acknowledgement.

In Central Bank of the South v. Dinsmore, 475 So.2d 842 (Ala. 1985), the Alabama Supreme Court stated the requirements for an equitable mortgage as the following: (1) an interest of the mortgagor in the property; (2) clear proof of the sum which was to be secured; (3) definite debt or obligation to be secured due from the mortgagor to the mortgagee; and (4) the intent of the parties to create a mortgage on property sufficiently described to secure an obligation.

It is clear from the facts sub judice that the requirements for an equitable mortgage are met. Defendants do not deny that they intended to create a mortgage, nor do they deny that they had an interest in the property for a certain and definite sum and with a definite debt or obligation. The fact that the mortgage instrument would be notarized later in no way affected Defendants' intentions to enter into a mortgage agreement at the time they signed it. For these reasons, this Court finds that Plaintiff holds a valid equitable mortgage on the property involved.

Defendants' final two contentions involve the equitable defenses of laches and unclean hands. Defendants have failed to plead or allege any facts that would show there was a delay by the Plaintiff in enforcing its claim or that any such delay prejudiced the Defendants. Likewise, Defendants have not alleged any specific

facts that would support a defense of unclean hands. The Defendants offered no proof of any of these defenses.

Therefore, it is the opinion of this Court that Plaintiff's motion for summary judgment should be granted and Defendants' motions for summary judgment should be denied. This Court will reserve ruling on Plaintiff's request for attorneys' fees.

An Order and Judgment will be entered in accordance with
this Opinion.

DONE this 9th day of November, 1988.

s/ Robert E. Varner
UNITED STATES DISTRICT JUDGE

APPENDIX C

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-7195

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV 9 1990
MIGUEL J. CORTEZ
CLERK

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of Twin City Savings, FSA,

Plaintiff-Appellee,

versus

ROBERT L. McCULLOUGH and MARY NAN McCULLOUGH,

Defendants-Appellants.

On Appeal from the United states District Court for the

Middle District of Alabama

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion SEPTEMBER 10, 11th Cir., 1990, ___F.2d___).

Before: TJOFLAT, Chief Judge, JOHNSON and ANDERSON, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

S/_____
UNITED STATES CIRCUIT JUDGE

ORD-42
(9/90)